Chuah Aik King (sole proprietor of Sykt B Three Technology) v Keydonesoft Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-30–05 OF 2016
WONG KIAN KHEONG J
30 APRIL 2018

Copyright — Infringement — Computer software — Whether plaintiff failed to prove copyright subsisted in software and that he owned the same — Whether plaintiff had no basis to sue defendant for copyright infringement

Evidence — Witness — Weight given to evidence — Plaintiff when giving evidence during cross-examination and re-examination referred to written statement without obtaining leave of court to do so — Whether evidence of plaintiff was thereby rendered inadmissible and had to be expunged — Whether plaintiff's evidence still admissible under s 5 of the Evidence Act 1950 ('the EA') as it concerned 'facts in issue' or 'relevant facts' — Whether nothing in EA provided that plaintiff's failure to obtain leave of court rendered his evidence inadmissible or liable to be expunged — Whether court had to scrutinise plaintiff's entire evidence with great care to decide what weight to attach to it — Evidence Act 1950 s 159

The plaintiff, who ran an internet café business, sued the defendant, a developer and provider of software for cyber café operators, for allegedly infringing his copyright in two computer programs ('the two programs'). The plaintiff relied upon two agreements (made in 2009 and 2013) he had made with a China-based company ('ZYS') whom he purportedly commissioned to produce the two programs, one of which was designed to block children below the age of 12 years from accessing the internet in internet cafes. In a statutory declaration, the plaintiff affirmed that the source codes for the two programs were authored by one Feng Jiang ('Feng') of ZYS (who was not called to testify at the trial). The plaintiff also alleged that there were many similarities in the screen shots of computer screen images and graphic user interface between his programs and the defendant's to support the claim of copyright infringement. Following a complaint made by the plaintiff, enforcement officers from the Ministry of Domestic Trade, Co-operatives and Consumerism raided the defendant's premises and seized various items including computers and the defendant's alleged infringing program ('the Keybilling Program'). In denying the plaintiff's claims, the defendant contended that its Keybilling Program was a customised software that it had commissioned ZYS to create and that the copyright in the Keybilling Program vested with ZYS. While giving evidence during his cross-examination and re-examination at the trial, the plaintiff

referred to a written statement without first obtaining leave of court to do so pursuant to s 159(1) or (2) of the Evidence Act 1950 and without giving a copy of that written statement to the defendant. That incident gave rise to the question whether the plaintiff's entire testimony given during cross-examination and re-examination was rendered inadmissible and had to be expunged.

Held, dismissing the suit with costs:

(1) The plaintiff failed to prove that copyright subsisted in the two programs and that he was the owner of such copyright. Accordingly, he had no right to sue the defendant for copyright infringement under s 37(1) of the Copyright Act 1987 ('the CA'). Even assuming the plaintiff owned copyright in the two programs, he failed to prove infringement of copyright pursuant to s 13(1) of the CA read together with the first limb of s 36(1) of the CA as no expert evidence was called to prove the first and third elements of the first limb and/or the plaintiff had not proven that the entire or a substantial part of the defendant's Keybilling Program had been copied from the two programs (see paras 41–42 & 54).

(2) Notwithstanding the plaintiff's failure to apply for leave of court to refer to a written statement while giving evidence, and the fact that that statement was not given to the defendant thereby depriving it of the right to cross-examine him on that document, the plaintiff's evidence was admissible under s 5 of the Evidence Act 1950 ('the EA') as it concerned 'facts in issue' and/or 'relevant facts' and nothing in the EA provided that his evidence was inadmissible and had to be expunged by reason of his failure to obtain the leave of court. However, in deciding whether to attach any weight to the plaintiff's oral evidence, the court had to scrutinise his evidence with great care because the testimony might not be his but based on what was stated in the written statement. In the instant case, there was no evidence to show that the plaintiff was an expert on computer programs; hence there was a genuine concern that the written statement could have been prepared by an expert on computer programs who did not testify at the trial (see paras 10–11 & 54).

(3) After a careful examination of the totality of the plaintiff's evidence, the court found that the plaintiff was not a credible witness. On the other hand, SD1 and SD2 were reliable witnesses for the defendant as their evidence corroborated each other and was supported by the documentary evidence (see paras 12–13).

(4) As the plaintiff did not call the investigating officer of the case to tender as evidence the items that were seized during the raid on the defendant's premises, he could not rely on the raid itself to support his case (see paras 14–16 & 54).

(5) The plaintiff could not claim copyright in any function of a computer program because a function of a computer program was not a 'literary work' but constituted an 'idea' under s 7(2A) of the CA which was not entitled to copyright protection (see paras 18–19 & 54).

(6) The plaintiff's statutory declaration ('SD') was not admissible as prima facie evidence that copyright subsisted in the two programs and that that copyright was owned by the plaintiff because the SD failed to exhibit a true copy of the two programs (either in the form of a CD or a DVD) as mandatorily required by s 42(1)(a)(iii) of the CA (see paras 24 & 54).

(7) The plaintiff failed to prove that: (a) he had authored the two programs; (b) took sufficient efforts to make the two programs original in character within the meaning of s 7(3)(a) of the CA; (c) the two programs had been written down, recorded or otherwise reduced to material form as required by s 7(3)(b) of the CA; and (d) the two programs qualified for copyright protection under s 10(1) or (2)(a) or (3) of the CA (see paras 27–28, 30, 34 & 54).

(8) The court drew an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950 for not calling Feng, the author of the source codes of the two programs, to testify at the trial (see paras 39 & 54).

[Bahasa Malaysia summary

Plaintif, yang menjalankan perniagaan kafe internet, menyaman defendan, pemaju dan penyedia perisian untuk pengendali kafe siber, kerana didakwa melanggar hak ciptanya dalam dua program komputer ('dua program'). Plaintif bergantung pada dua perjanjian (dibuat pada tahun 2009 dan 2013) yang dibuatnya dengan sebuah syarikat yang berpangkalan di China ('ZYS') yang mana dia telah ditugaskan untuk menghasilkan dua program, salah satunya direka untuk menyekat kanak-kanak di bawah umur 12 tahun dari mengakses internet di kafe internet. Dalam akuan berkanun, plaintif menegaskan bahawa kod sumber bagi kedua-dua program itu dikarang oleh seorang Feng Jiang ('Feng') dari ZYS (yang tidak dipanggil untuk memberi keterangan pada perbicaraan). Plaintif juga mendakwa bahawa terdapat banyak persamaan dalam tangkapan skrin dari skrin komputer dan antaramuka pengguna grafik antara programnya dan defendan untuk menyokong tuntutan pelanggaran hak cipta. Berikutan aduan yang dibuat oleh plaintif, pegawai penguatkuasa dari Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyerbu premis defendan dan merampas pelbagai barangan termasuk komputer dan program program defendan yang didakwa melanggar undang-undang ('Program Keybilling'). Dalam menafikan tuntutan plaintif, defendan berpendapat bahawa Program Keybilling itu adalah perisian disesuaikan yang telah ditugaskan oleh ZYS untuk dicipta dan bahawa hak cipta dalam Program Keybilling terletak hak oleh ZYS. Semasa memberi keterangan semasa pemeriksaan balas dan

pemeriksaan semula pada perbicaraan, plaintif merujuk kepada suatu pernyataan bertulis tanpa terlebih dahulu mendapatkan kebenaran mahkamah untuk berbuat demikian menurut s 159(1) atau (2) Akta Keterangan 1950 dan tanpa memberikan salinan kenyataan bertulis itu kepada defendan. Insiden itu menimbulkan persoalan sama ada testimoni keseluruhan plaintif yang diberikan semasa pemeriksaan balas dan peperiksaan semula telah menjadi tidak dapat diterima dan perlu dibuang.

Diputuskan, menolak guaman dengan kos:

(1) Plaintif gagal untuk membuktikan bahawa hak cipta terdapat di kedua-dua program dan bahawa beliau adalah pemilik hak cipta itu. Sehubungan itu, beliau tidak berhak untuk menyaman defendan untuk pelanggaran hak cipta di bawah s 37(1) Akta Hak Cipta 1987 ('Akta'). Walaupun dengan menganggap plaintif memiliki hak cipta dalam kedua-dua program, beliau gagal untuk membuktikan pelanggaran hak cipta menurut s 13(1) Akta dibaca bersama dengan cabang pertama s 36(1) Akta kerana tiada keterangan pakar dipanggil untuk membuktikan elemen pertama dan ketiga cabang pertama dan/atau plaintif tidak membuktikan bahawa keseluruhan atau sebahagian besar program Keybilling defendan telah ditiru dari kedua-dua program (lihat perenggan 41–42 & 54).

(2) Walaupun kegagalan plaintif untuk memohon kebenaran mahkamah untuk merujuk kepada satu pernyataan bertulis semasa memberikan keterangan, dan hakikat bahawa pernyataan itu tidak diberikan kepada defendan dan dengan itu melepaskan hak untuk menyoal balas beliau pada dokumen itu, keterangan plaintif boleh diterima di bawah s 5 Akta Keterangan 1950 ('AK') kerana ia berkenaan 'fakta dalam isu' dan/atau 'fakta relevan' dan tiada apa-apa pun dalam AK memperuntukkan bahawa keterangannya tidak dapat diterima dan perlu dibuang oleh sebab kegagalannya mendapatkan kebenaran mahkamah. Walau bagaimanapun, dalam memutuskan sama ada untuk meletakkan apa-apa berat kepada keterangan lisan plaintif, mahkamah perlu meneliti keterangannya dengan hati-hati kerana testimoni itu mungkin bukan miliknya tetapi berdasarkan apa yang dinyatakan dalam pernyataan bertulis itu. Dalam kes ini, tiada keterangan untuk menunjukkan bahawa plaintif adalah pakar dalam program komputer; oleh itu terdapat kebimbangan yang sebenar bahawa kenyataan bertulis itu boleh disediakan oleh seorang pakar dalam program komputer yang tidak memberi keterangan pada perbicaraan (lihat perenggan 10–11 & 54).

(3) Selepas pemeriksaan yang teliti terhadap keterangan plaintif, mahkamah mendapati bahawa plaintif bukanlah saksi yang boleh dipercayai. Sebaliknya, SD1 dan SD2 adalah saksi yang boleh dipercayai bagi defendan kerana keterangan mereka menyokong satu sama lain dan

disokong oleh bukti dokumentari (lihat perenggan 12–13).

(4) Oleh kerana plaintif tidak memanggil pegawai penyiasat kes itu untuk ditender sebagai bukti barang-barang yang dirampas semasa serbuan di premis defendan, beliau tidak boleh bergantung kepada serbuan itu sendiri untuk menyokong kesnya (lihat perenggan 14–16 & 54).

(5) Plaintif tidak dapat menuntut hak cipta dalam mana-mana fungsi program komputer kerana fungsi suatu program komputer bukanlah 'karya sastera' tetapi membentuk 'idea' di bawah s 7(2A) Akta yang tidak memberi hak kepada perlindungan hak cipta (lihat perenggan 18–19 & 54).

(6) Akaun berkanun plaintif ('SD') tidak boleh diterima sebagai bukti prima facie bahawa hak cipta terdapat di kedua-dua program dan bahawa hak cipta itu dimiliki oleh plaintif kerana SD gagal untuk mempamerkan salinan sebenar kedua-dua program (sama ada dalam bentuk CD atau DVD) seperti yang dikehendaki secara mandatori oleh s 42(1)(a)(iii) Akta (lihat perenggan 24 & 54).

(7) Plaintif gagal untuk membuktikan bahawa: (a) beliau telah mencipta kedua-dua program; (b) mengambil usaha yang mencukupi untuk menjadikan kedua-dua program asal dalam sifat dalam erti s 7(3)(a) Akta; (c) kedua-dua program telah ditulis, direkod atau dijadikan kepada bentuk material seperti yang dikehendaki oleh s 7(3)(b) Akta; dan (d) kedua-dua program layak untuk perlindungan hak cipta di bawah s 10(1) atau (2)(a) atau (3) Akta (lihat perenggan 27–28, 30, 34 & 54).

(8) Mahkamah membangkitkan anggapan bertentangan terhadap plaintif di bawah s 114(g) Akta Keterangan 1950 kerana tidak memanggil Feng, pengarang kod sumber kedua-dua program, untuk memberi keterangan pada perbicaraan (lihat perenggan 39 & 54).]

Notes

For a case on weight given to evidence, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3706.

For cases on computer software, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 8098–8101.

Cases referred to

Aktif Perunding Sdn Bhd v ZNVA & Associates Sdn Bhd [2018] 7 MLJ 692, HC (refd)

Alfa Laval (M) Sdn Bhd v Ng Ah Hai & Ors [2008] 5 MLJ 344, HC (folld)

Autodesk Inc v Dyason (No 1) (1992) 104 ALR 563, HC (folld)

Autodesk Inc v Dyason (No 2) (1993) 111 ALR 385, HC (folld)

Chau Kam Hoon v PP [2003] 4 MLJ 686, HC (distd)

Coogi Australia Pty Ltd v Hysport International Pty Ltd (1998) 157 ALR 247, FC (folld)
Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor [2015] 3 MLJ 1; [2015] 1 CLJ 887, FC (refd)
Elster Metering Limited & Anor v Damini Corporation Sdn Bhd & Anor [2012] MLJU 1753; [2012] 1 LNS 595, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)
Mediacorp News Pte Ltd & Ors v Mediabanc (Johor Bharu) Sdn Bhd & Ors [2010] 6 MLJ 657, HC (folld)
Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise) [2009] 3 MLJ 525, HC (refd)
Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors [2017] MLJU 1187; [2017] 7 AMR 560, HC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Petraware Solutions Sdn Bhd & Anor v Readsoft Aktiebolag & Anor [2013] MLJU 1606; [2014] 1 AMCR 112, CA (folld)
Richardson (John) Computers Ltd v Flanders [1993] FSR 497, Ch D (refd)
Risk-X Sdn Bhd v Capital Market Risk Advisor Sdn Bhd & Ors [2017] 8 MLJ 475; [2016] 1 LNS 1187, HC (folld)
SAS Institute Inc v World Programming Ltd [2013] EWCA Civ 1482, CA (folld)
SAS Institute Inc v World Programming Ltd [2013] EWHC 69 (Ch), Ch D (folld)
Sebastian v PP [1970] 2 MLJ 76 (distd)
Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit [2019] 7 MLJ 175; [2017] 1 LNS 1648, HC (refd)
Thrustcode Ltd v WW Computing Ltd [1983] FSR 502, HC (refd)
Yuen Chun Yii v PP [1997] 3 SLR 57, HC (distd)

Legislation referred to

Copyright Act 1987 ss 3, 3(a), (h), 7(1)(a), (1)(c), (2A), (3)(a), (3)(b), 10(1), (2)(a), (3), 13(1), 26(2)(a), 36(1), 37(1), 42(1), (1)(a)(iii), 44, 45, 45A, 46, 47, 53
Evidence Act [SG] ss 161, 163
Evidence Act 1950 ss 3, 5, 45(1), 51, 101(1), (2), 102, 114(g), 159, 159(1), (2), (4), 161

S Kulasegaran (S Kula & Co) for the plaintiff.
Foong Cheng Leong (Foong Cheng Leong & Co) for the defendant.

Wong Kian Kheong J:

A. BACKGROUND

[1] The plaintiff ('the plaintiff') claims that he owns the copyright in two computer programs ('two programs') as follows:

(a) 'B3 Café Internet Café Billing Management with MyCard Solution Software' program ('B3 program'); and

(b) 'Coin River Net Café Management System' ('Coin River program').

[2] The plaintiff alleges that the defendant company's ('the defendant') software, 'Keybilling Management System' ('Keybilling Program') has infringed plaintiff's copyright in the two programs under s 36(1) of the Copyright Act 1987 ('the CA').

B. ISSUES

[3] The following questions arise in this case:

(a) if a witness has given oral evidence based on a written statement (the witness has not obtained leave of the court to refer to the statement and the statement has not been adduced in court):

(i) can the court decide that the witness's oral evidence is inadmissible and expunge such evidence? and

(ii) if the witness's oral evidence is admissible, how should the court assess the weight of such evidence?

(b) whether a raid on the defendant's premises ('raid') by the Enforcement Division of the Ministry of Domestic Trade, Co-operatives and Consumerism ('Ministry') supports the plaintiff's claim in this case ('this suit');

(c) in view of s 7(2A) of the CA, can the plaintiff claim copyright in a function of a computer program?

(d) whether the plaintiff can rely on his statutory declaration ('the plaintiff's SD') as prima facie evidence under s 42(1) of the CA that:

(i) copyright subsists in the two programs; and

(ii) the plaintiff is the owner of copyright in the two programs;

(e) if the plaintiff cannot rely on the plaintiff's SD:

(i) whether the plaintiff is the 'author' of the two programs;

(ii) has sufficient effort been expended to make the two programs original in character within the meaning of s 7(3)(a) of the CA?

(iii) whether the two programs have been 'written down, recorded or otherwise reduced to material form' as required under s 7(3)(b) of the CA;

(iv) whether the two programs qualify for copyright protection:

(1) when the two programs have not been 'authored' by a 'qualified person' within the meaning of s 10(1) of the CA;

(2) if the two programs are not first published in Malaysia as required by s 10(2)(a) of the CA; and

(3) when the two programs are not made in Malaysia as provided in s 10(3) of the CA;

(v) whether an adverse inference under s 114(g) of the Evidence Act 1950 ('the EA') should be drawn against the plaintiff for not calling the person from Zhengzhou Yilingshin Software Co Ltd ('ZYS') who has authored the two programs; and

(f) whether the Keybilling Program has infringed the plaintiff's copyright in the two programs ('alleged copyright infringement'). In this regard:

(i) has the plaintiff proven that copyright subsists in the two programs and he is the owner of such a copyright as required by s 37(1) of the CA?

(ii) is the plaintiff required to adduce expert evidence under s 45(1) of the EA to prove the alleged copyright infringement? and

(iii) whether the alleged copyright infringement can be proven by the plaintiff showing a similarity in the screen shots of computer screen images and graphic user interface between the two programs and Keybilling Program.

C. THE PLAINTIFF'S CASE

[4] The plaintiff is the sole proprietor of 'B Three Technology', a registered business. The plaintiff' gave the following evidence, among others:

(a) the plaintiff runs an internet café business;

(b) the plaintiff has created 'MyCard Solution' software ('MyCard Solution Program') but the 'main engine' to run MyCard Solution Program is created by ZYS, a company in the People's Republic of China. Regarding MyCard Solution Program:

(i) the plaintiff has 'created' MyCard Solution Program in the sense that he had advised, given his ideas and commissioned ZYS to create MyCard Solution Program. To support such an assertion, the plaintiff relies on a 'copyright agreement' dated 13 January 2009 between the plaintiff and ZYS ('2009 agreement'); and

(ii) the function of MyCard Solution Program is to block students below 12 years of age from having access to the internet in internet café;

(c) the plaintiff relies on a 'copyright agreement/exclusive assignment' dated 10 January 2013 between B Three Technology and ZYS ('2013 Agreement (10 January 2013)'). Reliance was also placed by plaintiff on a 'letter of authorisation' dated 20 January 2013 by ZYS to B Three Technology ('authorisation letter (20 January 2013)');

(d) the plaintiff claims to own copyright in the two programs by relying on the plaintiff's SD. The hard copy of the 'source codes' of the two programs have been adduced by the plaintiff in this case. According to the plaintiff, the author of the two programs' source codes is one Mr Feng Jiang ('Mr Feng') from ZYS;

(e) the plaintiff has sold B3 Program to many entities (except the defendant);

(f) the defendant has infringed the plaintiff's copyright in the two programs. The plaintiff has complained about the alleged copyright infringement to the Ministry and this has led to the raid. During the raid, the Ministry's officers had seized, among others, the defendant's computers and Keybilling Program ('seized items');

(g) as a result of the alleged copyright infringement, the plaintiff alleges that he has suffered loss amounting to RM1.1m which consists of the following:

(i) payment of RM150,000 to ZYS;

(ii) a sum of RM600,000 has been paid in respect of MyCard Solution Program and B3 Program; and

(iii) loss of business amounting to RM350,000; and

(h) the plaintiff alleges that there are many similarities in the screen shots of computer screen images between B3 Program and Keybilling Program. The plaintiff also relies on a 'selective' comparison between the screen shots of graphic user interface of B3 Program and Keybilling Program.

D. THE DEFENDANT'S CASE

[5] Mr Lim Kah Beng ('SD1') is a director of the defendant. According to SD1, among others:

(a) the defendant is a developer and provider of software for cyber café operators; A

(b) the defendant had been asked by Mr Ng Shun Ming ('SD2') to provide a cyber café management software for cyber café operators in the Klang Valley ('SD2's request'). Pursuant to SD2's Request, the defendant appointed ZYS to provide a customized software which could be used by cyber café operators. The Keybilling Program was the customized software created by ZYS and offered by the defendant to cyber café operators; B

(c) the defendant does not have the source codes of Keybilling Program because copyright in Keybilling Program vests in ZYS; C

(d) after the raid, the defendant stopped supplying Keybilling Program; and

(e) there are differences between the graphic user interface of B3 program and Keybilling Program. D

[6] SD2 testified, among others, as follows:

(a) in 2012, the Selangor State Government required cyber café operators in Selangor to instal B3 Program (provided only by the plaintiff) to operate their cyber cafés. If cyber café operators in Selangor did not install B3 program, their licenses would not renewed. New licenses would not be issued to cyber café operators who did not use B3 program; E

(b) the plaintiff imposed an exorbitant license fee of RM1,999 for B3 program. Furthermore, the B3 program has limited functions; and F

(c) SD2 together with other cyber café operators in Selangor formed a society, 'Persatuan Pengusaha Pusat Siber Sihat Kuala Lumpur dan Selangor' ('society'). Members of the society could purchase Keybilling Program at a price of RM999. G

E. WHETHER THE COURT SHOULD EXPUNGE THE PLAINTIFF'S ORAL EVIDENCE GIVEN DURING CROSS-EXAMINATION AND RE-EXAMINATION H

[7] During the plaintiff's re-examination, the court noticed that he was reading from a written statement ('written statement'). The plaintiff did not obtain leave of court under s 159(1) or (2) of the EA to refresh his memory based on the written statement. Sections 159 and 161 of the EA provide as follows: I

159 Refreshing memory

(1) *A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is*

questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

(2) *The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.*

(3) *Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of that document*: Provided the court is satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treatises.

161 Right of adverse party as to writing used to refresh memory

Any writing referred to under section 159 or 160 must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon. (Emphasis added.)

The court inquired from the plaintiff on whether he would wish to apply for the court's permission under s 159(1) of the ea (if the written statement is made by the plaintiff) or s 159(2) of the EA (if the written statement is made by a person other than the plaintiff) to refresh his memory based on the written statement. The court informed the plaintiff that if the court grants permission to the plaintiff to do so, according to s 161 of the EA, a copy of the written statement must be given to the defendant and the defendant's learned counsel has the right to adduce the written statement as evidence in this case and may thereafter cross-examine the plaintiff based on the written statement. Upon hearing this, the plaintiff declined to apply for leave of court under s 159(1) or (2) of the EA to refresh his memory based on the written statement.

[8] Firstly, I am of the following view regarding the refreshing of a witness's memory based on a document during trial:

(a) there must be a need for a witness to refresh his or her memory based on a document. In *Chau Kam Hoon v Public Prosecutor* [2003] 4 MLJ 686 at p 693, Augustine Paul J (as he then was) decided as follows:

> *A witness cannot refresh his memory as of right and must therefore get the leave of court to do so* (see *Public Prosecutor v Paneerselvan & Anor* [1991] 1 MLJ 106; *Re The Detention of Leonard Teoh Hooi Leong* [1988] 1 MLJ 757; *Moomin bin Seman v Public Prosecutor* [1993] 3 MLJ 282). *There must be a need for the witness to refer to a document and it would not be proper to grant leave to refer to such a document simply because a request was made by a party (see Yuen Chun Yii v Public Prosecutor* [1997] 3 SLR 57). *The facts which entitle a witness to refresh his memory ought to be first elicited from him, that is to say, that he had no clear independent recollection but wanted to refresh his memory by seeing the writing (see Sabitri Thakurain v FA Svi* AIR 1933 306). (Emphasis added.)

(b) if there is a need for a witness to refer to a document (made by the witness) to refresh his or her memory: A

(i) the document should be made at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in the witness's memory ('requirement of contemporaneity'). The requirement of contemporaneity has been explained in *Chau Kam Hoon* at pp 692–693, as follows: B

> *In order to ensure that the document referred to is reliable, s 159 provides that the writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory or if the writing is made by someone else it must have been read by the witness within the aforesaid time and known by him to be correct.* In commenting on the time of preparation of the document, *Sarkar on Evidence* (15th Ed) Vol 2 says at p 2298: C D
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> *It is plain that no precise time limit is possible. The law does not require that the writing must have been made the moment the transaction took place. If it is not possible to make it contemporaneously with the transaction, it must be made so soon afterwards that it may be reasonably inferred that the facts were fresh in the mind. Whether the interval between the two, is such as to justify the presumption that memory became impaired, is a matter depending on the circumstances of each case and the retentive faculty of each witness. The section gives the court a discretion and if it considers it probable that the facts were fresh in the witness's mind when the writing was made, it will decide in favour of the document. In the case of a document written by another, it must be read and its accuracy recognized by the witness within the aforesaid time.* E F
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> *In dealing with the determination of contemporaneity, Stuart-Smith J said in R v Da Silva* [1990] 1 All ER 29 at p 32: G
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> Counsel for the appellant has drawn our attention to *R v Graham* (1973) Crim LR 628, in which the court said that a judge should hesitate before deciding that a statement made 27 days after the event was contemporaneous. But the court was not there saying that a statement made after that length of time could not be contemporaneous. *It is a question of fact and degree in each case, and the matter should be investigated to see that the events were fresh in the witness's mind after the lapse of time.* Much will depend on the nature of the evidence to be given. Where, for example, a witness purports to give a verbatim account of a conversation, the note will need to have been made much nearer the time than if he merely purports to give the general effect of a conversation. (Emphasis added.) H I

(ii) if the document to refresh a witness's memory, is not made by the witness, s 159(2) of the EA requires the document to have been read

by the witness within a time period which complies with the requirement of contemporaneity and at the time when the witness read the document, the witness knew the document to be correct;

(c) when the court exercises its discretion to grant leave for a witness to refresh his or her memory based on a document:

(i) s 161 of the EA provides that the adverse party has right to a copy of the document — please see *Chau Kam Hoon* at pp 694–695;

(ii) the adverse party may tender the document as an exhibit in the case; and

(iii) the adverse party may cross-examine the witness based on the document pursuant to s 161 of the EA — please see *Chau Kam Hoon* at p 695; and

(d) by reason of s 159(4) of the EA, an expert witness giving evidence under s 45(1) of the EA may refresh his or her memory based on any reference material without leave of court. The expert witness may use such reference material to support the grounds of his or her expert opinion under s 51 of the EA.

[9] In this case, the plaintiff had committed the following acts ('the plaintiff's conduct'):

(a) when the plaintiff gave evidence during cross-examination and re-examination ('the plaintiff's oral evidence'), he did not apply for leave of court to refresh his memory based on the written statement; and

(b) the plaintiff did not produce the written statement to the defendant.

The first question that arises is whether the plaintiff's oral evidence is rendered inadmissible by reason of the plaintiff's conduct. In *Chau Kam Hoon*, the High Court had held inadmissible the evidence of a prosecution witness who had refreshed his memory based on a record but the defence counsel was not given a right under s 161 of the EA to cross-examine the prosecution witness based on the record. It was decided in *Chau Kam Hoon* at p 695, as follows:

> In this case, the question of a denial of the right to inspect the document does not arise as no application was made to that effect. But *the defence was precluded from cross-examining PW3 on the entries in the record book on the ground that the court has given leave to the witness to refer to it. This is clearly irregular. The defence has been denied the opportunity to verify the document used by PW3 to refresh his memory. It is a miscarriage of justice as the defence has been deprived of its statutory right. Evidence is not admissible when a party has been deprived of his statutory right of cross-examination on it (see Baliram Tikaram v Emperor* AIR (32) 1945 Nag 1). The evidence of PW3 is therefore not admissible. (Emphasis added.)

[10] With respect, I am not able to follow *Chau Kam Hoon*. I am of the diffident view that if a witness has refreshed his or her memory based on a document and the adverse party is not given the document and/or is deprived of the right to cross-examine the witness based on the document (contrary to s 161 of the EA), the testimony of the witness is still admissible but in ascertaining the weight to be attached to such evidence, the court should scrutinise such evidence with great care. My opinion is premised on the following reasons:

(a) our ss 159 and 161 of the EA are identical to ss 161 and 163 of the Evidence Act of Singapore ('the EA (Singapore)'). Accordingly, Singapore cases on the construction of ss 161 and 163 of the EA (Singapore) may be considered in the interpretation of our ss 159 and 161 of the EA. I rely on the following two Singapore High Court cases:

(i) in *Sebastian v Public Prosecutor* [1970] 2 MLJ 76 at p 76, Winslow J decided as follows:

> The learned deputy public prosecutor on the authority of *Lau Pak Ngam v The Queen* [1966] HKLR 246; [1966] Crim LR 443 submitted that there was no rule that a witness should not refresh his memory from his former statement to the police. That case decided further, however, that anything in the nature of coaching would be reprehensible. Mr Marshall on the other hand referred to an Indian case (*Kanbi Vaghji Savji v State of Gujarat* [1968] Crim LJ 54) *which held that the value to be attached to the evidence of such a witness would depend on the circumstances of the particular case, since there was a likelihood that the witness would depose to what was contained in his previous statement rather than to what he actually recollected about what he had previously said. I would add, with respect, that another danger is, as adverted to in the Hong Kong case cited earlier, that a witness, who has refreshed his memory from his previous statement, might feel obliged to adhere to his previous statement even if he no longer believed it to be true*. I might observe, however, that the Indian authorities cited by Mr Marshall are based on s 162 of the Indian Criminal Procedure Code which differs from our s 121.
>
> *In the current appeal it was all the more important that the district judge should have scrutinised the evidence of PW9, Lee Kee Fatt, with even greater care than usual because, not only had he had his memory refreshed from his previous statement, parts of which 'may have been' read out to him over and over again (according to the officer conducting the investigation), but he was also clearly an accomplice and the principal witness on whom the prosecution rested all their hopes for a conviction of the appellant*. (Emphasis added.)

(ii) Yong Pung How CJ held as follows in *Yuen Chun Yii v Public Prosecutor* [1997] 3 SLR 57 at paras 25–26:

> 25. *Section 163 EA is worded in mandatory terms. In Re Jhubbo Mahton*

A *12 CLR 233, Field J observed that the grounds for permitting the adverse party the right to be shown the document are (i) to secure the full benefit of the witness's recollection as to the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement* (see also *Republic of India v GP Rajan* 1967 AIR 115 Or).

B 26. *The prosecution's refusal to show the defence the CPIB statement was in violation of a statutory entitlement, which must have been intended to safeguard the interests of the adverse party. As a result, the prosecution was effectively permitted to put leading questions to Chia during examination-in-chief. Answers given in response to leading questions may*
C *still be admissible* ... (Emphasis added.)

(b) according to s 5 of the EA, evidence may be given regarding a 'fact in issue' (defined in s 3 of the EA) and a 'relevant fact' (please see ss 3 and 5 of the EA). If the evidence of a witness who has refreshed his or her
D memory based on a document, concerns a 'fact in issue' or a 'relevant fact', such evidence may be given under s 5 of the EA (notwithstanding a breach of s 161 of the EA); and

(c) s 161 of the EA does not provide, expressly or by necessary implication,
E that a breach of s 161 of the EA shall render inadmissible the testimony of a witness who has refreshed his or her memory based on a document.

[11] In this case, the plaintiff did not apply for leave of court to refresh his memory based on the written statement. In this sense, *Sebastian*, *Yuen Chun Yii*
F and *Chau Kam Hoon* are distinguished from this case. Having said that, I am of the following view:

(a) notwithstanding the plaintiff's conduct, the plaintiff's oral evidence is admissible in this case. This is due to the following reasons:

G (i) the plaintiff's oral evidence concerns 'facts in issue' and/or 'relevant facts' in this case. Accordingly, the plaintiff's oral evidence may be given under s 5 of the EA; and

(ii) there is nothing in the EA which provides that the plaintiff's oral
H evidence is inadmissible by reason of the plaintiff's conduct and should be expunged from the court's record; and

(b) although the plaintiff's oral evidence is admissible in this case, in deciding whether the court should attach any weight to the plaintiff's oral evidence, the court should scrutinise with great care the entire evidence of
I the plaintiff (not only the plaintiff's oral evidence). This is due to the following reasons:

(i) the plaintiff's oral evidence might not be his testimony but might be based on the written statement. Worse still, the plaintiff might have adhered to the written statement even if he did not believe the

written statement to be true. In other words, the plaintiff might have been coached to testify in this case based on the written statement; and

(ii) this case concerns computer programs. There is no evidence that the plaintiff is an expert on computer programs as understood in s 45(1) of the EA (please see sub-para 28(2) below). Accordingly, there is a genuine concern that the written statement could have been prepared by an expert regarding computer programs (who is not called by the plaintiff to testify in this suit) and has been wrongly relied on by the plaintiff in this case.

F. CREDIBILITY OF WITNESSES

[12] As explained in the above Part E, due to the plaintiff's conduct, the court has to scrutinise carefully all of the plaintiff's evidence. After a careful examination of the totality of the plaintiff's evidence in this case, I find as a fact that the plaintiff is not a credible witness. This finding of fact is supported by the following evidence and reasons:

(a) the plaintiff signed the 2009 agreement and 2013 agreement (10 January 2013) (for B Three Technology). The 2009 agreement concerns only B3 Program (Version 1.3.1). The 2009 agreement purported to assign absolutely ZYS's copyright in B3 Program (Version 1.3.1) to the plaintiff. Confusingly, the 2009 agreement referred to ZYS as the party who is commissioned by the plaintiff!

Annexure A to 2013 agreement (10 January 2013) provides that the subject matter of 2013 agreement (10 January 2013) is Coin River Program, B3 Program (Version 1.3.1) and 'derivative works' of B3 Program ('three programs'). The 2013 agreement purported to assign absolutely ZYS's copyright in the three programs to the plaintiff. If ZYS's copyright in B3 Program (Version 1.3.1) had earlier been assigned absolutely to the plaintiff by virtue of 2009 agreement, there is no reason why the same software should be assigned a second time by ZYS to the plaintiff by way of 2013 agreement (10 January 2013). Inexplicably, the 2013 agreement (10 January 2013) did not refer to the 2009 agreement. There is a serious doubt regarding the genuineness of 2013 agreement (10 January 2013) and 2009 agreement;

(b) in the plaintiff's witness statement (answer to question No 34), he testified, among others, that certain screen shots of computer screen images of B3 Program and Keybilling Program were '100%' the same.

During cross-examination, the plaintiff admitted those screen shots of computer screen images of B3 Program and Keybilling Program were not '100%' the same;

(c) the plaintiff's solicitors sent a demand dated 2 February 2013 to the defendant ('the plaintiff's demand') regarding the alleged copyright infringement of B3 Program (Version 1.3.1). The plaintiff's demand did not allege that the defendant had infringed the plaintiff's copyright in Coin River Program. It is to be noted that the plaintiff's demand had been sent after the conclusion of the 2013 agreement (10 January 2013). If the plaintiff had ownership of copyright in Coin River Program by virtue of 2013 agreement (10 January 2013), the plaintiff's demand should have included Coin River Program. Furthermore, the cover page of 2013 agreement (10 January 2013) stated the name and contact details of the plaintiff's solicitors. In other words, the plaintiff's solicitors had actual knowledge of 2013 agreement (10 January 2013) and the plaintiff's purported ownership of copyright in Coin River Program; and

(d) the penultimate paragraph of the last page of the authorisation letter (20 January 2013) provided that if B Three Technology (the plaintiff is its sole proprietor) intends to file any civil suit regarding the two programs, B Three Technology 'shall first seek and obtain the approval' of ZYS. Before filing this action, the plaintiff had not obtained ZYS's approval as required by the authorisation letter (20 January 2013).

[13] I find as a fact that SD1 and SD2 are reliable witnesses. This is because firstly, SD1's oral evidence is corroborated by SD2's testimony. Secondly, SD2's oral evidence is supported by the following documentary evidence:

(a) SD2's letter dated 12 September 2012 to the Selangor State Government's Secretariat (Local Government Section), State Economic Planning Unit ('UPEN');

(b) UPEN's letter dated 26 December 2012 to SD2; and

(c) SD2's letter dated 1 July 2013 to UPEN.

G. WHETHER RAID HAS ANY EFFECT IN THIS SUIT

[14] The raid has been carried out pursuant to the powers conferred by ss 44, 45, 45A, 46 and 47 of the CA. Evidence obtained during the raid may support the prosecution of any offence under CA which can only be instituted by or with the written consent of the public prosecutor under s 53 of the CA.

[15] I am of the view that the seized items may be tendered by any party in

this civil suit (by calling the investigating officer ('IO') as a witness to tender the seized items) provided that the seized items are 'facts in issue' and/or 'relevant facts' within the meaning of ss 3 and 5 of the EA. However, the raid, in itself, does not support or oppose this civil suit.

[16] The plaintiff did not call the IO to produce the seized items in this case. Accordingly, the plaintiff cannot rely on the raid to support this suit.

H. CAN THE PLAINTIFF CLAIM COPYRIGHT IN A FUNCTION OF A COMPUTER PROGRAM?

[17] During the plaintiff's cross-examination, the plaintiff alleged that the Keybilling Program has the same functions as the MyCard Solution Program. The issue that arises is whether the plaintiff can claim copyright in the function(s) of a computer program.

[18] I am of the view that the plaintiff cannot claim copyright in any function of a computer program. This is because a function of a computer program constitutes an 'idea' under s 7(2A) of the CA and is therefore not entitled to copyright protection. I rely on the following cases:

(a) in the Court of Appeal case of *Petraware Solutions Sdn Bhd & Anor v Readsoft Aktiebolag & Anor* [2013] MLJU 1606; [2014] 1 AMCR 112 at paras 17–18, Mohamad Ariff Md Yusof JCA followed Arnold J's judgment in the English High Court in *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch) and held as follows

> [17] *The English High Court held (in SAS Institute) there was no infringement of copyright in a software where a second software merely reproduced the 'functionality' in that second software without copying the source code or the user manual which embodied the elements of the software. It was argued before the court that accepting the functionality of a computer programme could be protected by copyright 'would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development'.*
>
> [18] *On the facts of this appeal too, there was no evidence of copying of the structural design of the source code or the manuals. What the defendants created was, in our opinion, another data capture software which had a similar 'functionality' with the plaintiffs' software. This outcome could not per se amount to an infringement of copyright. What else could the 'system flow' be except a 'functionality'? It was too basic to be accepted as a 'structural design of the computer program'.* (Emphasis added.)

(b) my research has revealed that Arnold J's decision in *SAS Institute* has been affirmed on appeal, [2013] EWCA Civ 1482, but Lewison LJ in the English Court of Appeal has disagreed with some of Arnold J's reasoning According to Lewison LJ, at para 74:

A

> [74] ... *What is protected is the form of expression of an intellectual creation. The intellectual creation itself is not protected; and the functionality of a computer program does not count as a form of expression. The functionality of a computer program (in the sense of what it does and how it responds to particular inputs) falls on the ideas side of the line* ... (Emphasis added.)

B

It is to be noted that *SAS Institute* applies the test of 'intellectual creation' (laid down by the Court of Justice of the European Union) to decide originality of expression (which is entitled to copyright protection). Our s 7(3)(a) of the CA only requires sufficient effort to
C have been expended to make the work original in character — please see para 29 below;

(c) in the High Court case of *Alfa Laval (M) Sdn Bhd v Ng Ah Hai & Ors* [2008] 5 MLJ 344 at para 54, Ramly Ali J (as he then was) held as follows:

D

> [54] *The court accepts that the CAS program is a copyrightable work under the Copyright Act 1987. On the facts, it is the CAS program as a piece of software that is protected not the functionalities of what it does. This important distinction and difference has to be kept in mind.* (Emphasis added.)

E

(d) Dawson J decided as follows in the High Court of Australia in *Autodesk Inc v Dyason (No 1)* (1992) 104 ALR 563 at pp 571–572:

> *Indeed, the significance placed by Northrop J upon the function of the two locks would appear to be in disregard of the traditional dichotomy in the law of copyright between an idea and the expression of an idea. As Lindley LJ said in*
F *Hollinrake v Truswell: 'Copyright ... does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed'. The distinction has been criticised and it is true that it is often difficult to separate an idea from its expression, but it is nevertheless fundamental that copyright protection is given only to the form in which ideas are expressed, not to the ideas themselves. The protection of ideas, at*
G *all events when the subject of manufacture, is the province of patent law. There is a particular difficulty in distinguishing an idea from its expression in the case of a utilitarian work, such as a computer program, which, in contrast to literary works of an artistic kind, is intended to be useful rather than to please. But it has been held that the idea of a utilitarian work is its purpose or function and that the*
H *method of arriving at that purpose or function is the expression of the idea: see Whelan Associates v Jaslow Dental Laboratory, citing Baker v Selden. Thus, when the expression of an idea is inseparable from its function, it forms part of the idea and is not entitled to the protection of copyright ...* (Emphasis added.)

I

The High Court of Australia is its apex court;

(e) the respondents who lost their appeal in *Autodesk (No 1)* applied to the High Court of Australia to rehear that decision in *Autodesk Inc v Dyason (No 2)* (1993) 111 ALR 385. By a 3–2 majority decision, the High Court of Australia in *Autodesk (No 2)* declined to revisit *Autodesk (No 1)*.

Mason CJ dissented in *Autodesk (No 2)* regarding leave to rehear that case but commented as follows, at p 388:

> *Functionality is not the proper object of copyright protection. As Dawson J stated in Autodesk [No 1], the purpose or function of a utilitarian work is its idea, while the method of arriving at that purpose or function is the expression of the idea*. (Emphasis added.)

(f) in *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 157 ALR 247 at p 275, Drummond J in the Federal Court of Australia (court of first instance) decided as follows:

> Despite the criticisms that have been made of the accuracy of the proposition, *it is settled law in Australia that copyright protects not the underlying idea, but only the form of expression of the idea: see Autodesk (No 1)* (at CLR 344–5) and *Powerflex Services* (at 450). *It is also the law in Australia that merely because one program performs the same function as another, that is insufficient to make the one an infringement of copyright in the other: Autodesk (No 1)* (at CLR 344); *Autodesk (No 2)* (at CLR 304) and *Powerflex Services* (at 455). (Emphasis added.)

[19] A person may claim copyright in a computer program (not its function) as follows:

(a) a 'computer program' is a 'literary work' (please see s 3(h) of the CA) and is eligible for copyright under s 7(1)(a) of the CA — please see *Petraware Solutions*, at paras 4, 5, 11, 12 and 26. Section 3 of the CA defines a 'computer program' to mean:

> *an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function* either directly or after either or both of the following:
>
> (b) conversion to another language, code or notation;
>
> (c) reproduction in a different material form; (Emphasis added.)

(a) documents evidencing computer screen images and graphic user interface (from the use of a computer program) may constitute 'graphic work' (please see the definition of 'graphic work' in s 3(a) of the CA which includes a 'diagram') which falls within the definition of 'artistic work' in s 3(a) of the CA — please see *Petraware Solutions* at paras 8, 10 and 26. An artistic work is eligible for copyright under s 7(1)(c) of the CA.

I am of the following view:

(a) a function of a computer program, in itself, is not a literary work which is protected by copyright under s 7(1)(a) of the CA. The definition of a 'computer program' in s 3 of the CA refers to an 'expression, in any

language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function'. It is the 'expression, in any language, code or notation, of a set of instructions' in a computer program (not its function) which attracts copyright protection. It was decided in *Petraware Solutions* at paras 5 and 12, as follows:

> [5] *By this definition (s 3 CA), the core elements will be the source code (the technical outwardly readable programme of instructions in computer language) and the object code (the converted and machine-readable set of instructions), which in combination generates the software for use by the end-user* ...
>
> ...
>
> [12] *These instructions, whether embodied in the source or object codes, are by definition, 'literary works' in the context of our (CA)* ... (Emphasis added.)

(b) if a plaintiff claims copyright in a document which shows a computer screen image or a graphic user interface in respect of a computer program, the expression of the computer screen image or graphic user interface (not the function(s) of a computer program) on the document is the graphic work and artistic work which is protected by copyright.

[20] Based on the reasons explained in the above paras 18 and 19, a function of a computer program cannot be protected by copyright. Hence, the plaintiff cannot rely on the functions of the two programs to support this suit.

I. WHETHER THE PLAINTIFF CAN RELY ON THE PLAINTIFF'S SD

[21] I am of the view that this suit is based on the two programs as literary works and not as graphic works or artistic works. This decision is premised on the following reasons:

(1) in para 4 of the statement of claim ('SOC'), the plaintiff relies on agreements with ZYS. A perusal of 2009 agreement and 2013 agreement (10 January 2013) ('two agreements') shows that the plaintiff claims copyright in the two programs as literary works and not as graphic works or artistic works. This is because the two agreements did not concern the expression of computer screen images or graphic user interface (regarding the two programs) on documents;

(2) para 3 SOC states that the plaintiff is the owner of copyright in the 'software' (not in the expression of computer screen images or graphic user interface on documents) of the two programs. Paragraph 4 SOC further claims that the works have been created in 2011 by the plaintiff in the form of software (not in the expression of computer screen images or graphic user interface on documents); and

(3) in paras 9, 10, 13, 17, 18 and 19 SOC, the plaintiff alleges that defendant has infringed the plaintiffs copyright in the two programs by, among others, reproducing the two programs in Keybilling Program and by selling the Keybilling Program to third parties. The SOC did not plead that the defendant has copied the plaintiff's expression of computer screen images or graphic user interface (of the two programs) on documents and has sold those documents to third parties.

[22] Section 42(1) of the CA reads as follows:

s 42(1) ... *statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be —*

(a) *the owner of the copyright in any works eligible for copyright under this Act stating that —*

(i) *at the time specified herein copyright subsisted in such work;*

(ii) *he or the person named therein is the owner of the copyright; and*

(iii) *a copy of the work annexed thereto is the true copy thereof;*

...

shall be admissible in evidence any proceedings under this Act and shall be prima facie evidence of the facts contained therein. (Emphasis added.)

[23] The Federal Court in *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor* [2015] 3 MLJ 1; [2015] 1 CLJ 887 has interpreted s 42(1) CA. According to Jeffrey Tan FCJ in *Dura-Mine* at paras 11 and 28 (MLJ); 12 and 19 (CLJ):

[11] *Clearly, therefore, there was no requirement for the original drawing, original in the sense of not copied or in the sense of the first or the earliest, to be annexed to the affidavit or SD of the respondents. The requirement was for a true copy of the work, in the sense of a true and accurate depiction of the work in which copyright subsisted.*

...

[28] ... *Under s 42(1) of the (CA), an affidavit or SD made by or on behalf of a person claiming the copyright to any works eligible for copyright must strictly comply with the whole of s 42(1)(a)(i)–(iii). An affidavit or SD that does not, will not be admissible as prima facie evidence. But s 42 of the (CA) is far from being the be all and end all of proof. For other than by affidavit or SD, a person claiming copyright could adduce oral evidence and tender other evidence, the admission of which is not precluded by the Act. Section 42 provides a means but not the only means of proving copyright. And given that oral evidence, which is open to cross-examination and therefore of higher evidential value than affidavit or SD evidence, we agree with the pragmatic approach adopted by some courts to allow oral evidence to augment, correct, and or even supplant a defective s 42 affidavit or SD.* (Emphasis added.)

[24] Sub-paragraph 5(d) of the plaintiff's SD stated as follows (with

grammatical and typographical errors):

> Sesalinan karya asal iaitu Coin River Internet Café Management itu dilampirkan disini [sic] sebagai LAMPIRAN 'A', LAMPIRAN 'B' adalah salinan karya B3 Café dan Internet Billing Management Software, LAMPIRAN C adalah Copyright Agreement/Exclusive Assignment bertarikh 10.1.2013, LAMPIRAN 'D' adalah Letter of Authorization to Act bertarikh 20.1.2013 dan LAMPIRAN 'E' adalah Copyright Agreement bertarikh 13.1.2009.

The plaintiff's SD only exhibited documents purportedly regarding the two programs ('exhibits'). Section 42(1)(a)(iii) of the CA mandatorily requires 'true copies' of the two programs to be exhibited in the plaintiff's SD — please see *Dura-Mine*. As explained in the above para 21, this suit is based on the plaintiff's claim of copyright in the two programs as literary works (not as graphic or artistic works). Accordingly, the plaintiff should have exhibited in the plaintiff's SD a compact disc ('CD') or digital video disc ('DVD') which contains the two programs (as literary works) as a 'true copy' of the two programs. The exhibits do not constitute an 'expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function' within the meaning of the definition of a 'computer program' in s 3 of the CA. Hence, the exhibits do not constitute true copies of the programs as literary works and have breached the mandatory requirement of s 42(1)(a)(iii) of the CA ('breach'). In respect of the breach, I rely on Nalini Pathmanathan J's (as she then was) judgment in the High Court case of *Mediacorp News Pte Ltd & Ors v Mediabanc (Johor Bharu) Sdn Bhd & Ors* [2010] 6 MLJ 657, at paras 128–129, as follows:

> [128] The plaintiffs meet this objection raised by the defendants by contending that a copy of the radio broadcasts is indeed before this court in the form of exhs P2A, P2B, P2C and P2D. However the radio excerpts or programmes were not played in court, nor referred to. *More significantly however, such samples of the radio programmes, even if available in P2A–P2D, comprise a part of the 'infringing' copies as they comprise copies procured from the defendants. Section 42 (CA) envisages that a true copy of the works be produced by the plaintiffs to establish prima facie subsistence and ownership of copyright. Accordingly the requirements of that section and the other sections of the Act are not met. In order to establish copyright in the radio programmes it was incumbent upon the plaintiffs to produce a true copy of, at least, some radio programmes, as they did for the television news programmes.*
>
> [129] *It would be entirely inequitable, in the face of the pleadings in the instant case, where the establishment of copyright is heavily challenged, for this court to hold that the provision of samples of the television news programmes in itself is sufficient to evidence proof of subsistence and ownership of copyright in the radio programmes. Neither is it acceptable, in view of the minimum requirements in s 42 for this court to rely on exhs P2A–P2D. The court ought to have for its reference a true copy in conjunction with*

the infringing copy to enable a comparison to be undertaken. (Emphasis added.)

In view of the breach, based on *Dura-Mine* and *MediaCorp News*, the plaintiff's SD is not admissible as prima facie evidence that:

(a) copyright subsists in the two programs; and

(b) the plaintiff owns the copyright in the two programs.

J. WHETHER THE PLAINTIFF HAS PROVEN COPYRIGHT SUBSISTS IN TWO PROGRAMS AND IS OWNED BY HIM

[25] The plaintiff has the *legal* burden under s 101(1) and (2) of the EA to prove this suit on a balance of probabilities. The plaintiff also has the *evidential* burden under s 102 of the EA to adduce evidence in support of this suit. In the Federal Court case of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 at paras 51–59, Jeffrey Tan FCJ has explained the meaning and effect of legal and evidential burden of proof.

[26] The plaintiff's legal burden to prove this suit remains with the plaintiff and does not shift to the defendant. the plaintiff's evidential burden of proof is alleviated (not displaced) by s 42(1) of the CA (which allows the plaintiff's SD to be admitted as prima facie evidence that copyright subsists in the two programs and is owned by the plaintiff). As the plaintiff cannot rely on the plaintiff's SD (please see the above para 24), the plaintiff is required by s 102 of the EA to adduce oral and documentary evidence to prove that copyright subsists in the two programs and belongs to him — please see *Dura-Mine*.

J(1). Whether the plaintiff w as 'author' of two programs

[27] According to s 3(a) of the CA, an 'author' of a computer program (as a literary work) is its 'writer' or 'maker'.

[28] I find as a fact the plaintiff has failed to prove on a balance of probabilities that he is the writer or maker of the two programs. This finding is based on the following evidence and reasons:

(1) plaintiff has testified that Mr Feng (from ZYS) has authored the source codes of the two programs;

(2) a computer program can only be created by a person who is an 'expert' regarding computer programs within the meaning of s 45(1) of the EA. The plaintiff has not adduced any evidence regarding his qualification,

training, experience and achievement in the creation or development of software. Accordingly, I cannot accept the plaintiff's evidence that he has advised and given his ideas to ZYS regarding the creation of MyCard Solution Program. Furthermore, the plaintiff has not tendered evidence in this suit regarding any advice or idea purportedly given by the plaintiff to ZYS regarding MyCard Solution Program. Lastly, according to s 7(2A) of the CA, ideas are not protected by copyright;

(3) the plaintiff runs an internet café business and does not run a business in the development or provision of computer programs to third parties;

(4) for reasons explained in para 39 below, an adverse inference under s 114(g) of the EA is made against the plaintiff for not calling Mr Feng to testify in this suit; and

(5) the plaintiff is not a credible witness — please see the above para 12.

J(2). Whether s 7(3)(a) of the CA has been satisfied

[29] The plaintiff has the legal and evidential burden to prove in accordance with s 7(3)(a) of the CA that sufficient efforts have been expended to make the two programs original in character — please see *Petraware Solutions* at para 29.

[30] I am of the view that the plaintiff has failed to adduce any evidence that sufficient efforts have been expended to make the two programs original in character within the meaning of s 7(3)(a) of the CA.

J(3). Has the plaintiff fulfilled s 7(3)(b) of the CA?

[31] Section 7(3)(b) of the CA provides that a work 'shall not be eligible for copyright unless' the work has been 'written down, recorded or otherwise reduced to material form'. Section 3 of the CA has defined 'material form' in relation to a work, to include 'any form (whether visible or not) of storage from which the work ..., or a substantial part of the work ... can be reproduced'.

[32] It is clear that by reason of s 7(3)(b) of the CA, the plaintiff has the legal and evidential burden to prove that the two computer programs have been:

(a) written down;

(b) recorded; *or*

(c) otherwise reduced to 'material form. in the sense that the two computer programs have been stored in a form from which the two computer programs or a substantial part of the two computer programs can be reproduced ('three alternative limbs of s 7(3)(b) of the CA').

[33] In this case, the plaintiff has failed to adduce evidence to prove any of the three alternative limbs of s 7(3)(b) of the CA. Consequently, the two computer programs shall not be eligible for copyright pursuant to s 7(3)(b) of the CA.

J(4). Whether two computer programs qualify for copyright protection

[34] To qualify for copyright protection, the plaintiff has to fulfill one of the following three alternative conditions:

(a) the author of the two computer programs is a 'qualified person' — please see s 10(1) of the CA. Section 3 of the CA provides for the definition of a 'qualified person' as follows:

> (a) *in relation to an individual, means a person who is a citizen of, or a permanent resident in, Malaysia*; and
>
> (b) *in relation to a body corporate, means a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia*; (Emphasis added.)

(b) the two computer programs are first published in Malaysia — please see s 10(2)(a) of the CA; *or*

(c) the two computer programs are made in Malaysia — please see s 10(3) of the CA.

[35] It is clear that the plaintiff has failed to prove any one of the following circumstances for the two programs to qualify for copyright protection:

(a) as elaborated in the above para 28, the plaintiff is not the author of the two programs. The author of the two programs is either Mr Feng or ZYS. Mr Feng is neither a Malaysian 'citizen' (defined in s 3 of the CA) nor a permanent resident in Malaysia. ZYS is not a company incorporated under our companies' legislation. Accordingly, s 10(1) of the CA has not been fulfilled in respect of the two programs;

(b) no evidence has been adduced by the plaintiff to show that the two programs are first published in Malaysia within the meaning of s 10(2)(a) of the CA. On the contrary, sub-para 1(c) in Annexure A of the further and better particulars ('FBP') dated 11 December 2017 (provided by the plaintiff pursuant to a court order dated 27 October 2016) stated that the two programs were first published in China. The plaintiff is bound by its own FBP; *or*

(c) the two computer programs are developed in China (not in Malaysia) on 1 March 2005 — please see sub-para 1(d) in Annexure A of the plaintiff's FBP. As such, the plaintiff cannot avail himself of s 10(3) of the CA.

J(5). Can the plaintiff rely on s 26(2)(a) of the CA?

[36] Section 26(2)(a) of the CA provides that, among others, when a party commissions another party to create a work, 'copyright shall be deemed to be transferred to the person who commissioned the work' — please see *Aktif Perunding Sdn Bhd v ZNVA & Associates Sdn Bhd* [2018] 7 MLJ 692 at sub-paras 33(2) and (3).

[37] In this case, the plaintiff cannot rely on s 26(2)(a) of the CA to claim that he has copyright in the two programs because the substance of 2009 agreement purports to assign absolutely ZYS's copyright in B3 Program (Version 1.3.1) to the plaintiff. The substance of 2013 agreement (10 January 2013) also claims to assign absolutely ZYS's copyright in the three programs to the plaintiff. It is therefore clear that the plaintiff did not commission ZYS to produce the two computer programs by way of the two agreements.

K. WHETHER AN ADVERSE INFERENCE UNDER S 114(G) OF THE EA SHOULD BE MADE AGAINST THE PLAINTIFF

[38] An adverse inference may be drawn under s 114(g) of the EA against a party for suppressing material evidence — please see Mohd Azmi SCJ's judgment in the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494.

[39] This court invokes an adverse inference under s 114(g) of the EA against the plaintiff. This is because the plaintiff should have called Mr Feng, the author of the source codes of the two programs, to testify regarding the development of the two programs. No evidence has been adduced on why Mr Feng could not have been called or subpoenaed to give evidence in this case.

L. COPYRIGHT INFRINGEMENT

L(1). Whether the plaintiff is entitled to sue for copyright infringement

[40] Section 37(1) of the CA provides as follows:

> 37 *Action by owner of copyright* and relief
>
> (1) *Infringements of copyrights* and the prohibited acts under sections 36A and 36B *shall be actionable at the suit of the owner of the copyright* and, in any action for such an infringement or prohibited act, the court may grant the following types of relief: ... (Emphasis added.)

[41] According to s 37(1) of the CA, only an owner of a copyright may file a suit for copyright infringement. For reasons expressed in the above Parts

J(1)–J(4) and K, the plaintiff has failed to discharge the legal and evidential burden to prove on a balance of probabilities that copyright subsists in the two programs and he is the owner of such a copyright. Accordingly, the plaintiff has no right to institute this suit for copyright infringement under s 37(1) of the CA. On this ground alone, this suit is dismissed with costs.

L(2). Has the plaintiff proven copyright infringement?

[42] I will now assume that the plaintiff has proven copyright subsists in the two programs and he is the owner of such a copyright. The question now is whether the Keybilling Program has infringed the plaintiff's copyright in the two programs.

[43] I reproduce below the definition of 'reproduction' (s 3 of the CA), ss 13(1) and 36(1) of the CA:

> *reproduction means the making of one or more copies of a work in any form or version*, and in relation to an artistic work includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work, and *reproducing shall be construed accordingly*;
>
> 13 *Nature of copyright in literary*, musical or artistic *works*, films and sound recordings
>
> (1) *Copyright in a literary*, musical or artistic *work*, a film, or a sound recording or a derivative work *shall be the exclusive right to control in Malaysia* —
>
> (a) *the reproduction in any material form*;
>
> ...
>
> *of the whole work or a substantial part thereof*, either in its original or derivative form ...
>
> 36 *Infringements*
>
> (1) *Copyright is infringed by any person who does*, or causes any other person to do, *without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act*. (Emphasis added.)

[44] Section 36(1) of the CA has two limbs — please see *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187; [2017] 7 AMR 560 at paras 49 and 50. The two limbs of s 36(1) of the CA are:

(a) when a person ('X') does an act which is controlled by copyright under the CA ('first limb'); and

(b) when a person causes X to do an act which is controlled by copyright under the CA ('second limb').

[45] Subparagraph 1(b) in Annexure A of the plaintiff's FBP alleges that the defendant has copied the two computer programs in their entirety. Subparagraphs 3(b) and (c) in Annexure A of the plaintiff's FBP further aver that the defendant has copied the source codes of, among others, certain modules in MyCard Solution. This suit therefore concerns only the first limb (not the second limb), namely whether the defendant has done an act which is controlled by the plaintiff's copyright under CA. This concerns the issue of whether the Keybilling Program is a 'reproduction' (as defined in s 3 of the CA) in a 'material form' (please see its definition in s 3 of the CA) of:

(a) the two programs in their entirety; or

(b) a substantial part of the two programs,

within the meaning of s 13(1) read with the first limb.

[46] Regarding the first limb, I refer to *Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit* [2019] 7 MLJ 175; [2017] 1 LNS 1648 at para 59, as follows:

> 59. *Regarding copyright infringement under the first limb, my research has shown that case law has not spoken in one voice. Firstly, I refer to the three elements of copyright infringement under the first limb ('three elements (first limb)') as decided by Low Hop Bing J (as he then was) in the High Court in Megnaway Enterprise Sdn Bhd v Soon Lian Hock* [2009] 3 MLJ 525 *at para 41. The three elements (first limb) are:*
>
> (1) *a plaintiff has to prove sufficient objective similarity between:*
>
> (a) *the plaintiff's copyright work or a substantial part of the copyright work*; and
>
> (b) *the alleged infringing work ('impugned work')*. ('first element (first limb)')
>
> *Regarding the first element (first limb), a visual comparison between the original work and impugned work will be undertaken by the court — Megnaway Enterprise* at para 46.
>
> In the Court of Appeal case of *Elster Metering Limited & Anor v Damini Corporation Sdn Bhd & Anor* [2012] MLJU 1753; [2012] 1 LNS 959, at paras 9 and 14–15, Ramly Ali JCA (as he then was) referred to the first element (first limb) as held by the following English courts:
>
> (i) Diplock LJ's (as he then was) judgment in the Court of Appeal case of *Francis Day & Hunter Ltd & Anor v Bron & Anor* [1963] 1 Ch 471; and
>
> (ii) Lord Millett's judgment in the the House of Lords in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at pp 708–709;
>
> (2) *the plaintiff must prove that there is a causal connection between the copyright work and impugned work, namely, the impugned work is proven to have been copied from the copyright work, whether directly or indirectly ('second element (first limb)')*. The second element (first limb) has been applied in *Elster Metering* at paras 9–11 and 28.

If the first element (first limb) is proven by a plaintiff, there is a rebuttable presumption of copying and the evidential burden then shifts to the defendant to prove that the impugned work has not been copied from the copyright work or the impugned work has been created by the defendant independently of the copyright work — Megnaway Enterprise at para 43. *It should be emphasised that the legal burden under s 101(1) and (2) of the EA to prove the three elements (first limb), remains solely on the plaintiff and does not shift at all to the defendant.*

...;

(3) *what has been copied in the Impugned Work must constitute a substantial part of the original work ('third element (first limb)')*. The third element (first limb) has been referred to in *Elster Metering* at para 16. (Emphasis added.)

[47] According to *Elster Metering Limited & Anor v Damini Corporation Sdn Bhd & Anor* [2012] MLJU 1753; [2012] 1 LNS 595 (Court of Appeal's judgment) and *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525 (High Court's decision), the first element of first limb ('first element') is that there must be proof of sufficient objective similarity between:

(a) the source codes and object codes of the two programs or a substantial part of those source codes and object codes; and

(b) the source codes and object codes of Keybilling Program.

[48] I am of the view that the first element can only be decided by the court with the assistance of evidence from an expert on computer programs under s 45(1) of the EA. I rely on Azizah Nawawi J's judgment in the High Court case of *Risk-X Sdn Bhd v Capital Market Risk Advisor Sdn Bhd & Ors* [2016] 1 LNS 1187 at paras 27 and 31, as follows:

[27] *Witnesses who know about computer programmes or persons who are experts in computer programmes must come to court to explain the substantive similarities in the both programmes. Only then can this court come to a finding of substantive similarity.* We are not dealing with a simple copyrighted picture here, where the court can see and make the comparison with the naked eyes.

...

[31] *In this case there is no evidence at all to establish an infringement. There was no analysis made to both computer programmes in order to ascertain the substantive similarity, when viewed objectively. In the premise, I find that the plaintiff has failed to prove copyright infringement of its computer programme by the defendants.* (Emphasis added.)

[49] The plaintiff has not called any expert on computer programs to testify regarding the first element. As elaborated in the above sub-para 28(2), the plaintiff is not an expert on computer programs. In the circumstances, I find as

a fact that the plaintiff has failed to prove the first element on a balance of probabilities.

[50] I have not overlooked the plaintiff's evidence which showed a similarity between the screen shots of computer screen images and graphic user interface of the two programs and the Keybilling Program. Such evidence cannot prove the first element because screen shots of computer screen images and graphic user interface do not constitute evidence of source codes and object codes of a computer program. I refer to the following English High Court cases:

(a) in *Thrustcode Ltd v WW Computing Ltd* [1983] FSR 502 at p 505, Robert Megarry VC decided as follows:

> In the normal case in which an infringement of literary copyright is alleged, it is possible to put side by side the written, typed or printed words in which the plaintiff claims copyright and the corresponding words which are said to infringe that copyright. The words can be seen and compared and discussed. *In the case of computer programs, the software appears to consist of articles which by magnetic or electrical means will make the hardware do certain things, together with what is recorded on various tapes and discs. By means of this, the letters, signs and numbers of the program may be made to appear on a screen or on a print-out; and if this is done, then the familiar process of comparison is made possible. Yet where, as here, the claim is to copyright in the program itself, the results produced by operating the program must not be confused with the program in which copyright is claimed*. If I may take an absurdly simple example, 2 and 2 make 4. But so does 2 times 2, or 6 minus 2, or 2 per cent of 200, or 6 squared divided by 9, or many other things. *Many different processes may produce the same answer and yet remain different processes that have not been copied one from another. For computers, as for other things, what must be compared are the thing said to have been copied and the thing said to be an infringing copy. If these two things are invisible, then normally they must be reproduced in visible form, or in a form that in some way is perceptible, before it can be determined whether one infringes the other*. (Emphasis added.)

(b) *Thrustcode* has been followed by Ferris J in *Richardson (John) Computers Ltd v Flanders* [1993] FSR 497 at p 527, as follows:

> Before ending my comments on general approach I must, I think, address a further problem which arises in a case of this kind. *Under the 1988 Act [United Kingdom's Copyright, Designs and Patents Act 1988] computer programs are protected as 'literary works'. They are, nevertheless invisible to the eye which can discern a conventional literary work. As Sir Robert Megarry VC remarked in the Thrustcode case, if two things which are invisible are to be compared then normally they must be reproduced in visible form, or in a form which is in some way perceptible, before it can be determined whether one infringes copyright in the other. The two main ways, perhaps the only ways, in which a computer program*

> *can be made visible are by printing out the code on paper or by displaying on screen the prompts, entries, reports and other material which the program presents in visible form to the user. The latter is not, however, itself the program. It is a product of the program. The fact that two programs may produce a similar screen display may or may not be indicative of a similarity in the programs. The screen display is not itself the literary work which is entitled to copyright protection*. (Emphasis added.)

[51] Based on *Elster Metering* and *Megnaway Enterprise*, the second element of first limb is fulfilled when the plaintiff proves a causal connection between the two programs and the Keybilling Program, namely, the plaintiff must prove that the latter has been copied from the former, whether directly or indirectly ('second element'). No evidence to substantiate the second element has been led by the plaintiff in this case. In fact, SD1's evidence shows that the Keybilling Program has been custom-made by ZYS for the defendant (pursuant to SD2's request).

[52] The third element of first limb, according to *Elster Metering* and *Megnaway Enterprise*, is that the plaintiff must satisfy the court that what has been copied in Keybilling Program, constitutes the whole or a substantial part of the two programs ('third element'). In this case, sub-para 1(b) in Annexure A of the plaintiff's FBP alleges that the defendant has copied the two computer programs in their entirety. Once again, the court can only decide the third element based on expert evidence. The plaintiff's failure to call an expert on computer programs to testify regarding the third element, is fatal to this suit.

[53] Premised on the above reasons, I am constrained to find as a fact that the plaintiff has failed to prove that the defendant has done an act regarding the Keybilling Program which is controlled by the plaintiff's copyright in the two programs within the meaning of the three elements of the first limb.

M. SUMMARY OF THE COURT'S DECISION

[54] In summary:

(a) despite the plaintiff's conduct, the plaintiff's oral evidence is admissible in this case. However, the court has to scrutinise with great care the entire evidence of the plaintiff in deciding whether to attach any weight thereto. After a careful scrutiny of the totality of the plaintiff's evidence, the court finds as a fact that the plaintiff is not a credible witness;

(b) the plaintiff did not call the IO to tender the seized items as evidence in this

case. Accordingly, the plaintiff cannot rely on the raid to support this suit;

(c) a function of a computer program constitutes an 'idea' under s 7(2A) of the CA which is not protected by copyright. The plaintiff cannot therefore rely on the functions of the two programs in this case to support this suit;

(d) the plaintiff could not rely on the plaintiff's SD because the plaintiff's SD did not exhibit a true copy of the two programs (either in a CD or DVD) as mandatorily required by s 42(1)(a)(iii) of the CA;

(e) the plaintiff has failed to prove that:

(i) he is the author of the two programs;

(ii) sufficient efforts have been expended to make the two programs original in character within the meaning of s 7(3)(a) of the CA;

(iii) the two programs have been written down, recorded or otherwise reduced to material form as required under s 7(3)(b) of the CA; and

(iv) the two programs qualify for copyright protection under s 10(1), (2)(a) or (3) of the CA;

(f) an adverse inference under s 114(g) of the EA is drawn against the plaintiff for not calling Mr Feng, the author of the source codes of the two programs, to testify in this case; and

(g) this suit is dismissed because:

(i) the plaintiff has failed to prove that copyright subsists in the two programs and he is the owner of such a copyright. Accordingly, the plaintiff has no right to sue for copyright infringement under s 37(1) of the CA; and/or

(ii) infringement of copyright in the two programs pursuant to s 13(1) of the CA read with the first limb has not been proven because:

(1) there is no expert evidence to prove the first and third elements; and/or

(2) the plaintiff has not proven that the entire or a substantial part of Keybilling Program has been copied from the two programs.

[55] In the upshot, this suit is dismissed with costs.

Suit dismissed with costs.

Reported by Ashok Kumar